Office - Supreme Court, U.S.
FILED
SEP 17 1982
CLERK

No. 81-2198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PAPER INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
AMERICAN TEXTILE MANUFACTURERS INSTITUTE, *et al.*,
NATIONAL COAL ASSOCIATION, and
VIRGINIA ELECTRIC AND POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and
ANNE M. GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

PETITIONERS' REPLY BRIEF ON CERTIORARI

THEODORE L. GARRETT
PATRICIA A. BARALD
CORINNE A. GOLDSTEIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Petitioners Chemical Manufacturers Association, et al.

September 1982

TABLE OF CONTENTS

	Page
I. The Decision Below Should Be Reviewed Now	2
II. The Decision Below Creates A Conflict In The Circuits	4
III. The Decision Below Is Contrary To The Language And Purpose Of The Clean Water Act	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:	Page
American Iron and Steel Institute v. *EPA*, 543 F.2d 521 (3d Cir. 1976)	4
Bethlehem Steel Corp. v. *EPA*, 538 F.2d 513 (2d Cir. 1976)	4
Central Hudson Gas & Electric Corp. v. *EPA*, 587 F.2d 549 (2d Cir. 1978)	4
Statutes:	
28 U.S.C. § 1331	6
33 U.S.C. § 1319	6
33 U.S.C. § 1362(11)	5
33 U.S.C. § 1365	6
33 U.S.C. § 1369(b)(1)(E)	5
33 U.S.C. § 1369(b)(1)(F)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2198

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PAPER INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
AMERICAN TEXTILE MANUFACTURERS INSTITUTE, *et al.*,
NATIONAL COAL ASSOCIATION, and
VIRGINIA ELECTRIC AND POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and
ANNE M. GORSUCH, ADMINISTRATOR, U.S.
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITIONERS' REPLY BRIEF ON CERTIORARI

Respondents EPA, et al. do not contest the fact that the decision below involves recurring and important questions concerning judicial review under the Clean Water Act, but oppose the granting of certiorari on the grounds (1) that in its present posture, this case is not an appropriate vehicle for reconciling any conflict in the circuits, and (2) that the court below adopted a reasonable interpretation of the statutory language. EPA fails to demonstrate logically how it is possible to reconcile the decisions of the courts of appeals. Nor can "practical considerations" vest the court of appeals with jurisdiction not conferred by Congress, as EPA maintains.

I. THE DECISION BELOW SHOULD BE REVIEWED NOW.

The respondents do not contest the fact that this Court has jurisdiction to review interlocutory decisions of courts of appeals. The Court has not hesitated to grant such petitions where, as here, legal issues of great public importance are presented that are fundamental to the further conduct of the case. (Pet. 8, n.10). Respondents also do not dispute that the decision below involves important recurring questions concerning judicial review under the Clean Water Act. (Pet. 11-13). Under the circumstances, interlocutory review is warranted in this case.

Neither of EPA's arguments that review would be premature can withstand scrutiny. First, EPA implies that the challenged regulations may never be reviewed in the court of appeals. (EPA Br. 5). This suggestion is puzzling and has no basis. As EPA notes (EPA Br. 5, n.2), petitioners have identified unresolved issues that they plan to litigate in the D.C. Circuit. EPA fails to mention that other petitioners below have also advised the parties and the D.C. Circuit that they will raise additional issues concerning these regulations. There has been no suggestion by EPA, any other party, or the D.C. Circuit that these issues are not ripe for review.[1]

Second, EPA argues that this Court is being asked to decide a hypothetical question, and suggests that the jurisdictional holding below may be rendered academic by the D.C. Circuit's decision on the merits. (EPA Br. 5-6). On the contrary, the jurisdictional issue raised here will not disappear even if the

---

[1] EPA notes that many of the challenges to the consolidated permit regulations have been remanded to EPA pursuant to a settlement agreement, and that the D.C. Circuit recently granted a joint motion of petitioners and EPA to dismiss certain other issues as not ripe for review. (EPA Br. 5, n.2). The relevant fact, however, is that a number of ripe issues unquestionably remain to be litigated.

D.C. Circuit should rule in favor of the petitioners or dismiss the remaining issues for lack of ripeness.[2] The regulations involved are lengthy and complex, and new issues that cannot now be anticipated will arise as they are implemented and enforced. As a result, continuing litigation as to the validity of the scope of these regulations is virtually certain. The decision below gives rise to recurring questions concerning the proper court for judicial review of these regulations.

The jurisdictional issue will continue to haunt courts and litigants alike. If the decision below is allowed to stand, virtually all EPA regulations under the Clean Water Act will now be subject to challenge in both federal courts of appeals and district courts. (Pet. 5, 11). Burdensome litigation and conflicting decisions as to jurisdiction are likely. The conflict between the circuits on this critical issue creates complete confusion as to the proper forum for judicial review for the many thousands of dischargers throughout the country that are subject to Clean Water Act requirements.

The jurisdictional issue presented can and should be decided now, in advance of briefing on the merits. The D.C. Circuit had no difficulty in deciding the issue on this basis. EPA's proposal that petitioners raise the jurisdictional argument after the D.C. Circuit rules on the merits will only delay unnecessarily the resolution of an important and recurring issue.

---

[2] As noted above, we are aware of no basis for respondents vague suggestions as to non-ripeness. The Government does not appear to argue that the jurisdictional issue would remain if the D.C. Circuit should decide that the remaining issues are ripe and rules in a fashion adverse to the petitioners.

II. THE DECISION BELOW CREATES A CONFLICT IN THE CIRCUITS.

The D.C. Circuit "specifically rejected the reasoning" of the decision of the Third Circuit in *American Iron and Steel Institute* v. *EPA*, 543 F.2d 521 (3d Cir. 1976), on the issue now before this Court. (Pet. 8). In response to the direct conflict between the decision below and that in *AISI*, EPA engages in speculation as to what the Third Circuit *might have done* under different circumstances. EPA contends that *AISI* arose before EPA had changed its position as to the scope of jurisdiction under Section 509 of the Clean Water Act, and that the Third Circuit agreed with EPA's prior construction of the statute. By the time the issue arose in the D.C. Circuit, EPA had reversed itself. (*See* Pet. 5-6). EPA thus speculates that the Third Circuit might have taken another view if EPA had then concluded that the regulations in question were effluent limitations. (EPA Br. 6). This speculative analysis ignores the fact that the issue presented to both the Third Circuit and the court below was a legal question of statutory construction for the courts, not the Agency, to decide. There is no indication that the Third Circuit gave undue deference to EPA's initial position on this issue, which we believe was the correct one. The two courts of appeals have reached opposite conclusions on an important legal issue of statutory construction, and EPA's own vacillations on that issue merely underscore the need for certiorari.

A second conflict discussed in our petition also supports the grant of certiorari. As we pointed out, the construction given to Section 509(b) of the Clean Water Act below is also inconsistent with the approach taken by the Second Circuit in *Bethlehem Steel Corp.* v. *EPA*, 538 F.2d 513 (2d Cir. 1976), and *Central Hudson Gas & Electric Corp.* v. *EPA*, 587 F.2d 549 (2d Cir. 1978). (Pet. 10-11). EPA's brief does not dispute this conflict.

III. THE DECISION BELOW IS CONTRARY TO THE LANGUAGE AND PURPOSE OF THE CLEAN WATER ACT.

In Section 509 of the Act, Congress carefully provided for original court of appeals jurisdiction over EPA actions in only six enumerated situations. The D.C. Circuit held that the regulations involved here fell under one of these, namely "approving or promulgating any effluent limitation or other limitation." 33 U.S.C. § 1369(b)(1)(E). As set forth in our petition, the language and history of the Act as well as a number of judicial decisions demonstrate that this term refers to numerical restrictions on the quantities of pollutants that may be discharged. The statute defines an effluent limitation as "any restriction . . . on quantities, rates and concentrations" of pollutants, including schedules of compliance. 33 U.S.C. § 1362(11). We are seeking review by this Court because the D.C. Circuit has assumed jurisdiction over regulations that have virtually nothing to do with limitations on discharges of pollutants, as the court below acknowledged. (Pet. 4, 17).

In response, EPA argues that the phrase "other limitation" is broad enough to include restrictions on the discharge of pollutants of all sorts, whether or not they are expressed in numerical terms. (EPA Br. 7). The D.C. Circuit and respondents stretch this term beyond recognition in applying it to regulations essentially unrelated to restrictions on discharges of effluents, such as regulations governing the persons that may sign permit applications and monitoring reports, the sharing of information by the states with EPA, the EPA review of state permits, and the conduct of permit hearings. (Pet. 4). We fail to see how these provisions relate in any way to effluent limitations, and the brief in opposition is silent on this question.[3]

---

[3] The respondents' brief (at 8) does attempt to give some examples of provisions of NPDES regulations that they believe "are reasonably regarded" as effluent limitations or other limitations subject to

Finding no support in the language or legislative history of the statute, EPA relies on "practical" considerations. (EPA Br. 8-10). Such considerations are not valid bases for expanding court of appeals jurisdiction where Congress has not so provided. Even the best of policy reasons cannot vest the courts with jurisdiction not conferred by Congress. (*See* Pet. 13-14, 18).

Moreover, the practical considerations cited are not persuasive. EPA argues that our construction of the statute would permit the courts of appeals to review individual actions in issuing or denying permits, but deny them power of direct review of the procedural regulations governing their issuance. But even under EPA's own theory, the circuit courts would at the time of permit issuance have *no* power of direct review of any regulations subject to Section 509(b) due to that section's 90 day preclusion, except where those rules had been previously unripe or where there were "grounds arising" after the 90 day period. (*See* Pet. 5). Under petitioners' view, a collateral review of rules normally subject to review by a district court[4] could also be had by a court of appeals in connection with direct

---

direct appellate review. However, the few strained examples cited cannot justify the assertion of jurisdiction over regulations that are basically procedural.

[4] *See* Pet. 3; 33 U.S.C. § 1365; 28 U.S.C. § 1331. Similarly, under the construction of the statute adopted by the D.C. Circuit and EPA, district courts would have jurisdiction over suits by EPA and private citizens alleging violations of EPA's NPDES regulations, yet would be totally without power to consider the validity of those regulations. *See* 33 U.S.C. §§ 1319, 1365.

review of the issuance or denial of permits, and the 90 day preclusion in Section 509(b) of the Act would not apply.[5]

CONCLUSION

The decision below involves fundamental questions as to the proper court for judicial review of EPA regulations under the Clean Water Act. We urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

THEODORE L. GARRETT
PATRICIA A. BARALD
CORINNE A. GOLDSTEIN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioners Chemical Manufacturers Association, et al.

---

[5] *See* 33 U.S.C. § 1369(b)(1)(F). The respondents also argue that the consolidated regulations contain separate provisions governing permit programs under other statutes, and that petitioners do not dispute the jurisdiction of the D.C. Circuit to review the non-NPDES aspects of the regulations. However, we fail to see how that point is relevant. The NPDES permit regulations must be reviewed in the court Congress directed in the Clean Air Water Act and based on the authority granted to EPA in that Act. The fact that the Agency elected to consolidate separate regulations governing several unrelated programs under acts with different Congressional determinations as to jurisdiction does not make it more sensible for a single court to decide issues arising under several different regulations and statutory schemes.